

**THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

**BASF AGRO B.V., ARNHEM (NL),
WÄDENSWIL BRANCH, BAYER S.A.S.,
and MERIAL LIMITED,**

Plaintiffs,

v.

CHEMINOVA, INC.,

Defendant.

Civil Action No. 10-cv-274-WO-WWD

**PLAINTIFFS' OBJECTION TO AND MOTION TO POSTPONE
BRIEFING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

Pursuant to Federal Rule of Civil Procedure 16(b), LR 56.1, and the Court's direction to counsel during the April 6 conference call, BASF Agro B.V., Arnhem (NL), Wädenswil Branch ("BASF"), Bayer S.A.S. ("Bayer"), and Merial Limited (collectively "Plaintiffs") object to Defendant Cheminova, Inc.'s Summary Judgment Motion (D.I. 100) (hereinafter, the "Motion") as premature and filed in violation of the Local Rules of this Court. Plaintiffs respectfully request, pursuant to LR 83.4, that the Court postpone the briefing schedule for Cheminova's Motion and adopt the briefing schedule for dispositive motions already discussed and contemplated by the parties. (*See* Ex. A, Proposed Order attached hereto.)

Cheminova has put the cart squarely before the horse by filing its summary judgment motion before expert discovery even began. This makes no sense. For the sake of efficiency and completeness, expert reports and depositions should go first, giving the parties a full record with which to develop summary judgment arguments and ensuring that the Court will have all the information necessary to inform its rulings on dispositive motions. Indeed, this is

the very reason that all the scheduling stipulations and orders in this case have put dispositive motions after the close of fact and expert discovery. (*See, e.g.*, D.I. 23 & 56).

Additionally, Cheminova's Motion directly contradicts the parties' understanding developed in correspondence over the past few months that expert reports would be followed by expert depositions and then dispositive motions. The proposed amended scheduling orders recently exchanged between the parties consistently called for (i) the exchange of expert reports (proposed most recently for April 6);¹ (ii) the close of fact and expert discovery on patent liability issues (on May 13);² and (iii) the deadline for dispositive motions on patent liability issues on May 20. (*See, e.g.*, Exs. B & C, attached hereto.)

Cheminova's purported reliance on the Court's November 17, 2010 Scheduling Order (D.I. 61) setting an April 4, 2011 deadline for filing summary judgment motions is disingenuous at best. Since at least January, the parties have acknowledged the need to amend the schedule, including the dates for expert discovery and dispositive motions, to accommodate the parties' discovery needs. (*See, e.g.*, Exs. B & C) In fact, the same November 17 schedule Cheminova relied on contains a number of deadlines that, by agreement, have been adjourned:

- Opening Briefs on Claim Terms and Positions on December 6, 2010 (actually December 13, 2010);
- Opposition Briefs on Claim Terms and Positions on December 20, 2010 (actually January 12, 2011);

¹ The parties in fact exchanged the first round of expert reports on April 6, with Plaintiffs submitting expert reports by Drs. Michael Potter and Jeffrey Winkler, and Cheminova submitting expert reports by Drs. C. Douglass Mampe and Brian Forschler.

² Cheminova's Motion also ignores that certain fact discovery is still outstanding. For example, Merial still has outstanding deposition and document subpoenas in Delaware to third-parties Velcera, Inc. and FidoPharm, Inc. (collectively "Velcera"). Velcera entered into an agreement with Cheminova whereby Cheminova agreed to supply fipronil technical material, yet Merial has not been able to determine what Velcera did with this fipronil. Velcera has opposed this discovery, and Merial's related motion to compel and Velcera's cross motion for a protective order are pending in the United States District Court for the District of Delaware. *See* 1:2010-mc-00260.

- Exchange of Burden expert reports on February 1, 2011 (actually exchanged on April 6, 2011);
- Close of fact and expert discovery on patent liability issues on March 15, 2011 (has not yet occurred).

Moreover, were the November 17 schedule in fact in place, Cheminova's summary judgment filing would violate LR 56.1's notice requirement. LR 56.1(a) provides that "[a]ny party who intends to file a motion for summary judgment . . . must file and serve notice of intention to file a dispositive motion within 14 days following the close of the discovery period." Under the same schedule relied on by Cheminova for the alleged April 4 summary judgment deadline (D.I. 61), fact and expert discovery closed on March 15 and, accordingly, Cheminova's April 4 Notice of Intent to File Dispositive Motions (D.I. 99) is improper under LR 56.1. Cheminova's failure to abide by the Local Rules in this regard is alone grounds to adopt the more reasonable briefing schedule in the Proposed Order (Ex. A) that allows for the completion of fact and expert discovery. *See* LR 83.4(a)(3) (stating that when a party violates a Local Rule, the court may "stay[] proceedings until the rule is complied with"). Cheminova has no excuse for its failure to abide by LR 56.1's notice requirement. *See, e.g., Boyles v. United States*, 171 F. Supp. 2d 556, 559 (M.D.N.C. 2001) (finding that "it has long been the standard policy of the judges of this Court that motions which are not filed in accordance with the requirements of the Local Rules will not be considered except in extraordinary circumstances," and rejecting summary judgment motion for failure to comply with LR 56.1(a) & (b)).³

³ Extraordinary circumstances may exist when a party is somehow prevented from filing its pleading, or from the nature of the case itself, *i.e.*, where the case appears frivolous or the non-movant fails to respond to the motion whatsoever. *Boyles*, 171 F. Supp. 2d at 559. Such extraordinary circumstances are not present here.

CONCLUSION

As noted above, the timing of Cheminova's summary judgment motion is premature because it predates both the parties' expert reports and expert depositions. In order to resolve this conflict, Plaintiffs propose a summary judgment briefing schedule similar to the one contemplated by the parties in their recent discussions. Under that schedule, opening summary judgment motions and supporting papers would be due on May 20, 2011, and opposition briefs would be due on June 3. Replies would be due on June 17, in accordance with L.R. 56.1. Such a schedule would serve to align the summary judgment phase of this litigation with that in effect in the Makhteshim litigation (10-cv-276-WO-WWD) and, at the same time, correct the complications and inefficiencies caused by Cheminova's premature filing.

WOMBLE CARLYLE SANDRIDGE & RICE, PLLC

DATED: April 8, 2011.

Pressly M. Millen

Pressly M. Millen (NCSB No. 16178)
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601
pmillen@wcsr.com
phone: (919) 755-2100
fax: (919) 755-2150

*Attorneys for Plaintiffs
BASF Agro B.V., Arnhem (NL), Wädenswil Branch
and Bayer S.A.S.*

Of Counsel:

Kenneth A. Gallo
Craig Benson
Kent Kemeny
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
2001 K Street NW
Washington, DC 20006-1047
kgallo@paulweiss.com
cbenson@paulweiss.com
kkemeny@paulweiss.com
phone: (202) 223-7300
fax: (202) 223-7420

John E. Nathan
Catherine Nyarady
Kripa Raman
Brian P. Egan
Jayson L. Cohen
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
jnathan@paulweiss.com
cnyarady@paulweiss.com
kraman@paulweiss.com
began@paulweiss.com
jlcohen@paulweiss.com
phone: (212) 373-3000
fax: (212) 757-3990

Counsel for BASF Agro B.V., Arnhem (NL), Wadenswil Branch

Robert J. Koch
MILBANK, TWEED, HADLEY & McCLOY LLP
1850 K Street, N.W., Suite 1100
Washington, DC 20006
rkoch@milbank.com
phone: (202) 835-7500
fax: (202) 835-7586

Counsel for Bayer S.A.S.

ALSTON & BIRD, LLP

/s/ Jitendra Malik

Jitendra Malik, Ph.D. (NCSB No. 32809)

ALSTON & BIRD, LLP

Suite 4000

101 South Tryon Street

Charlotte, NC 28280-4000

Tel.: (704) 444-1115

Fax.: (704) 444-1695

jitty.malik@alston.com

Attorney for Plaintiff Merial Limited

Of Counsel:

Judy Jarecki-Black, Ph.D.

MERIAL LIMITED

3239 Satellite Blvd.

Duluth, GA 30096-4640

Tel.: (678) 638-3805

Fax: (678) 638-3350

judy.jarecki@merial.com

Frank G. Smith, III

John W. Cox, Ph.D.

Matthew W. Howell

ALSTON & BIRD, LLP

1201 West Peachtree Street

Atlanta, GA 30309-3424

Tel.: (404) 881-7000

Fax: (404) 881-7777

frank.smith@alston.com

john.cox@alston.com

matthew.howell@alston.com

Deepro R. Mukerjee

ALSTON & BIRD, LLP

90 Park Avenue

New York, NY 10016-1387

Tel.: (212) 210-9501

Fax: (212) 922-3881

deepro.mukerjee@alston.com

J. Patrick Elsevier, Ph.D.

JONES DAY

12265 El Camino Real, Suite 200

San Diego, CA 92130

Tel.: (858) 314-1200

Fax: (858) 314-1150

jpelsevier@jonesday.com

Counsel for Merial Limited

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the **PLAINTIFFS' OBJECTIONS TO AND MOTION TO POSTPONE BRIEFING ON DEFENDANT'S MOTION FOR SUMMARY JUDGMENT** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants: Daniel Alan M. Ruley, aruley@belldavispitt.com, William K. Davis, wdavis@belldavispitt.com, Christopher G. Kelly, christopher.kelly@hklaw.com, Steven L. D'Alessandro, steven.dalessandro@hklaw.com, Robert J. Burns, robert.burns@hklaw.com, Joshua C. Krumholz, Joshua.krumholz@hklaw.com, Jitendra Malik, jmalik@alston.com, John Patrick Elsevier, jpelsevier@jonesday.com, Matthew W. Howell, matthew.howell@alston.com, Com, Judy C. Jarecki-Black, jduy.jarecki@merial.com, and Frank G. Smith, frank.smith@alston.com.

DATED: April 8, 2011.

/s/ Pressly M. Millen

Pressly M. Millen (NCSB No. 16178)
WOMBLE CARLYLE SANDRIDGE & RICE, PLLC
150 Fayetteville Street, Suite 2100
Raleigh, NC 27601
Telephone: (919) 755-2100
Facsimile: (919) 755-2150
Email: pmillen@wesr.com

*Attorneys for Plaintiffs
BASF Agro B.V., Arnhem (NL), Wädenswil Branch and
Bayer S.A.S.*

Of Counsel:

Kenneth A. Gallo
Craig Benson
Kent Kemeny
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, LLP
2001 K Street NW
Washington, DC 20006-1047
Telephone: (202) 223-7300
Facsimile: (202) 223-7420
Email: kgallo@paulweiss.com
cbenson@paulweiss.com
kkemeny@paulweiss.com

John Nathan
Catherine Nyarady
Kripa Raman
Brian Egan
Jayson L. Cohen
PAUL, WEISS, RIFKIND, WHARTON
& GARRISON, LLP
1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 757-3990
Email: jnathan@paulweiss.com
cnyarady@paulweiss.com
kraman@paulweiss.com
began@paulweiss.com
jlcohen@paulweiss.com

Of Counsel for BASF Agro B.V. , Arnhem (NL), Wädenswil Branch

Robert J. Koch
MILBANK, TWEED, HADLEY & MCCLOY LLP
1850 K Street, N.W., Suite 1100
Washington, DC 20006
Telephone: (202) 835-7500
Facsimile: (202) 835-7586
Email: rkoch@milbank.com

Of Counsel for Bayer S.A.S.